

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Consolidated Edison Energy Massachusetts, Inc. Docket Nos. ER06-819-000
ER06-819-001
ER06-819-002

ORDER CONDITIONALLY ACCEPTING AND SUSPENDING RELIABILITY
MUST RUN AGREEMENT AND ESTABLISHING HEARING AND SETTLEMENT
JUDGE PROCEDURES

(Issued August 25, 2006)

1. On March 30, 2006, as supplemented on June 26, 2006 and June 28, 2006, Consolidated Edison Energy Massachusetts, Inc. (CEEMI) filed a proposed unexecuted Reliability Must Run Agreement (RMR Agreement) between CEEMI and the Independent System Operator-New England, Inc. (ISO-NE) for two 48 MW oil- and gas-fired combustion turbine electric generating units (GT-1 and GT-2, or collectively, GTs) located at CEEMI's West Springfield Station in West Springfield, Massachusetts. CEEMI requests that the Commission accept the proposed RMR Agreement and grant waiver of the Commission's 60-day prior notice requirement to permit the RMR Agreement to become effective March 31, 2006, subject to refund.¹ In this order, pursuant to section 205 of the Federal Power Act (FPA), we conditionally accept and suspend for a nominal period the proposed RMR Agreement, make it effective March 31, 2006, subject to refund, and establish hearing and settlement judge procedures.²

¹ See 16 U.S.C. § 824d (2000); 18 C.F.R. § 35.3 (2006).

² 16 U.S.C. § 824d (2000).

I. Background

2. ISO-NE has authority, pursuant to Market Rule 1,³ to negotiate power supply agreements for the purchase of electricity at cost-based rates from generation facilities that ISO-NE identifies as being necessary to ensure reliability, but which are unable to recover operating costs under current market conditions.

II. CEEMI's Filings

3. CEEMI owns West Springfield Station which consists of GT-1 and GT-2, a 107 MW oil and gas-fired steam generator (WS-3),⁴ and one 22 MW gas-fired turbo jet (WS-10). CEEMI acquired ownership of the West Springfield Station in 1999 and in June 2002 installed GT-1 and GT-2 in place of older steam units WS-1 and WS-2.⁵

4. CEEMI seeks approval of its proposed RMR Agreement “to ensure that GT-1 and GT-2 remain available to the ISO-NE to support system reliability, and to provide fair compensation to GT-1 and GT-2 for so doing.”⁶ CEEMI maintains that the proposed RMR Agreement is necessary for GT-1 and GT-2 pending the implementation of a Commission-approved Locational Installed Capacity (LICAP) market design or other forward capacity market mechanism.⁷ Thus, CEEMI states that, following formal notification by ISO-NE in February 2006 that GT-1 and GT-2 were needed for reliability, it negotiated the proposed RMR Agreement with ISO-NE. CEEMI maintains that the

³ ISO New England, Inc., FERC Electric Tariff No. 3, Market Rule 1, section III, Appendix A, at III.A.6.2, First Revised Sheet No. 7434 and section III, Appendix A, Exhibit 2 at 3.3, Second Revised Sheet No. 7461.

⁴ WS-3 is currently the subject of a separate RMR Agreement in Docket Nos. ER05-903, *et al.* See *Consolidated Edison Energy Massachusetts, Inc.*, 112 FERC ¶ 61,263 (2005).

⁵ Only the GTs are to receive cost-of-service based revenues pursuant to this RMR Agreement, although CEEMI states that some of the costs incurred in maintaining and operating the GTs are common to, and shared among, the CEEMI facilities at the West Springfield Station and other CEEMI facilities.

⁶ Transmittal Letter at 1.

⁷ On June 16, 2006, the Commission accepted a proposed settlement agreement that provides for the implementation of a Forward Capacity Market (FCM) as an alternative to LICAP. Full implementation of FCM is expected in June 2010. See *Devon Power, LLC*, 115 FERC ¶ 61,340 (2006) (Order Accepting Settlement).

proposed RMR Agreement is, with limited exceptions that reflect the specific circumstances of the West Springfield Station, substantially similar to the *Pro Forma* Cost-of-Service Agreement contained in ISO-NE's Market Rule 1 (*Pro Forma* COS Agreement).

5. In return for the reliability services provided by GT-1 and GT-2, the proposed RMR Agreement allows CEEMI to receive its fixed costs for GT-1 and GT-2 through the ISO-NE monthly settlement process. Acting as agent for CEEMI, Consolidated Edison Energy (CEE), an exempt wholesale generator, will bid energy and ancillary services from GT-1 and GT-2 into the NEPOOL markets based upon the units' characteristics and Stipulated Bid Costs as formulated in the proposed RMR Agreement.⁸ CEEMI proposes a rate methodology to derive the units' Annual Fixed Revenue Requirement which is translated into a monthly fixed-cost charge. The proposed rate methodology credits certain revenues against the monthly fixed cost charge. These revenues include: (1) revenues resulting from clearing prices in excess of the units' Stipulated Bid Costs; (2) Installed Capacity (ICAP) revenues; and (3) any other revenues from the units. CEEMI also states that GT-1 and GT-2 will be subject to reductions in the monthly fixed-cost charge for unavailability. The proposed RMR Agreement requires CEEMI to notify ISO-NE of a forced outage of GT-1 and GT-2, along with any return to service costs. Within thirty days of a notice of forced outage, after assessing the nature, expected duration, and expected incurrence of additional expenses, either party may notify the other that it has determined that GT-1 or GT-2 should be shut down. The proposed RMR Agreement will expire on the implementation date of a LICAP mechanism or other forward capacity market mechanism applicable to GT-1 and GT-2. CEEMI requests an effective date of March 31, 2006 for the proposed RMR Agreement.

6. On May 26, 2006, the Commission's Director, Division of Tariffs & Market Development – East, acting pursuant to delegated authority, issued a deficiency letter seeking additional information relating to CEEMI's proposed RMR Agreement. Specifically, the deficiency letter sought additional data regarding ISO-NE's determination that the GTs were needed to maintain system flows within the applicable reliability criteria and additional data regarding CEEMI's facility costs and cost-of-service. On June 26, 2006, as revised on June 28, 2006, CEEMI responded to the deficiency letter. CEEMI also asked that certain information included in its response be treated as privileged information under 18 C.F.R. § 388.112 (2006). ISO-NE also filed additional information in response to the deficiency letter regarding the need for the GTs to assure system reliability.

⁸ The Stipulated Bid Costs are self-adjusting formulaic rates that reflect agreed-upon formulae and marginal costs for fuel, variable operation and maintenance (O&M) expenses and environmental allowances, as defined in the proposed RMR Agreement and as reported to ISO-NE.

III. Notice of Filings and Responsive Pleadings

7. Notice of CEEMI's filing was published in the *Federal Register*, 71 Fed. Reg. 19,720 (2006), with interventions and protests due on or before April 20, 2006. Notices of CEEMI's supplemental filing and the revision thereto were also published in the *Federal Register*, 71 Fed. Reg. 38,633 (2006) and 71 Fed. Reg. 38,873 (2006), with interventions and protests due on or before July 17, 2006 and July 19, 2006. Notice of ISO-NE's response to the deficiency letter was published in the *Federal Register*, 71 Fed. Reg. 38,633 (2006), with comments due on or before July 17, 2006.
8. Timely motions to intervene were filed by: New England Power Pool Participants Committee (NEPOOL), Massachusetts Municipal Wholesale Electric Company, South Hadley Electric Light Department, and Chicopee Municipal Light Plant (collectively, MMWEC), Select Energy, Inc., ISO-NE, Northeast Utilities Services Company on behalf of the Northeast Utilities Companies (NUSCO), and the Attorney General of the Commonwealth of Massachusetts (MassAG).
9. ISO-NE, NUSCO, and MassAG protested the filing.⁹ MMWEC filed a motion to reject the filing or, in the alternative, a protest. NEPOOL filed comments regarding the filing.
10. Fitchburg Gas and Electric Light Company (Fitchburg) filed a motion to intervene out-of-time in which it joined in the comments of NUSCO.
11. CEEMI filed an answer out of time to the protests on May 9, 2006 (May 9 Answer). MMWEC filed a response to CEEMI's May 9 Answer on May 24, 2006.
12. In response to CEEMI's supplemental filing and ISO-NE's response, MMWEC filed a motion to reject, a protest, and a request for a Commission-issued protective order. On August 1, 2006, CEEMI and ISO-NE both filed answers to MMWEC's protest. MMWEC filed a response to CEEMI's and ISO-NE's answers on August 16, 2006.

⁹ ISO-NE protested CEEMI's addition of language to section 9.10.2 of the RMR Agreement regarding treatment of confidential information. In its response to protests, CEEMI acknowledged that it inadvertently added the language to section 9.10.2 and agreed to remove the added language. CEEMI is directed to make this revision in a compliance filing within 30 days of the date of this order.

IV. Discussion

A. Procedural Matters

13. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Given the early stage of the proceeding, the lack of undue prejudice or delay and the party's interest, we find good cause to grant the unopposed, untimely motion to intervene of Fitchburg.

14. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2006), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept the answers of MMWEC, CEEMI, and ISO-NE because they have provided information that assisted us in our decision-making process.

B. Need for RMR Agreement

1. CEEMI's Filings

15. CEEMI argues that an RMR Agreement is necessary for GT-1 and GT-2 because the units are needed for reliability, and because the deferral of LICAP in New England "has put generators such as CEEMI in a position whereby they have essentially no choice but to seek reliability agreements."¹⁰ CEEMI states that ISO-NE confirmed the need for GT-1 and GT-2 for system reliability in a February 2006 report, noting that both GT-1 and GT-2 are needed to maintain system flows within the applicable reliability criteria of both ISO-NE and Northeast Utilities for system thermal performance for key contingencies at load levels below the projected summer peak for 2006. Specifically, according to CEEMI, ISO-NE's analysis indicates that GT-1 and GT-2 individually alleviate thermal overload on the 1322 Line between East Springfield and Breckwood.

16. In support of its need for an RMR Agreement, CEEMI notes that GT-1 and GT-2 operate relatively infrequently. CEEMI indicated that, since they commenced commercial operation in June 2002, the capacity factors of the GTs have been between 2 and 6 percent.¹¹ As such, CEEMI states that the future economic viability of the GTs is "uncertain," and the proposed RMR Agreement is necessary to assure the units' continued operation and availability to support ISO-NE's transmission reliability criteria. CEEMI also states that the GTs have been generating a net loss nearly consistently since they first went into commercial operation in June 2002, calculating that the GTs have lost

¹⁰ Transmittal Letter at 9.

¹¹ *Id.* at 6.

approximately \$9.7 million between mid-2002 through 2005.¹² Further, CEEMI argues that the proposed RMR Agreement is the “only means presently available for assuring continuing unit availability on the basis of rates that can be determined as just and reasonable rates pending implementation of a comprehensive LICAP or other Commission-approved capacity compensation program.”¹³

2. **Reliability Determination**

a. **ISO-NE’s Response**

17. In ISO-NE’s response to the deficiency letter, it reaffirms that the GTs are needed for reliability and that there are no projects currently under construction that could alleviate the need for the GTs. ISO-NE also clarifies that its reliability determination for the GTs is determined by the impact of the single element 1254 line contingency.

b. **Supplemental Comments**

18. In reply to ISO-NE’s response, MMWEC argues that it has not been established that GT-1 and GT-2 are needed for reliability. According to MMWEC, ISO-NE’s initial reliability determination for the GTs did not consider whether the system could address the loss of the 1254 line through the adjustment of area generation, without one or both of the GTs in operation. MMWEC also questions why ISO-NE did not analyze load shedding, transmission switching, or generation redispatch as an acceptable means to ensure system reliability rather than designating the GTs as RMR units, particularly because violations only occur when New England load exceeds 25,400 MW and the Berkshire generating facility is out of service.¹⁴ Specifically, in support of using transmission switching, MMWEC asserts that, on July 19, 2005, ISO-NE opened the 115

¹² *Id.* at 8.

¹³ *Id.* at 9.

¹⁴ MMWEC cites to ISO-NE’s May 30, 2006 revised reliability determination for Fore River in Docket No. ER06-822, *et al.*, in which ISO-NE states that “two single element contingencies could potentially violate operations criteria if not otherwise addressed. However, ISO-NE has identified operational solutions that maintain compliance with operating criteria through the adjustment of area generation.” MMWEC also cites to ISO-NE’s comments that “if the stuck breaker contingencies were to occur, they would be addressed through special switching arrangements, or a combination of local area load shedding and generator re-dispatch.”

kV ties from Agawam, Massachusetts to Bloomfield, Connecticut, in order to cut the through-flows from Springfield into Connecticut.¹⁵

c. ISO-NE's Answer

19. In its August 1 answer, ISO-NE addresses the supplemental comments of MMWEC. ISO-NE states that, in the case of Fore River, some of the overloads identified in the original reliability determination for the unit were a result of modeling too much generation in service on a particular portion of the system. ISO-NE states that following the revised Fore River reliability determination, the GTs were examined to determine whether changes in generation would alter the finding of need. However, regarding the GTs, the overloads could not be eliminated because the overloads are due to a generation deficiency in the Springfield area, as opposed to a situation where there is too much generation.

20. In response to MMWEC's claims that load shedding, transmission switching, and generation redispatch could be used to ensure system reliability, ISO-NE states that Fore River involved a multiple element contingency; however, the overloads identified for the GTs are due to a single element contingency. Also, ISO-NE states that, when the GTs were reexamined, consideration was given to the transmission switching action of opening the 115 kV ties between Massachusetts and Connecticut. This action caused little change to flows in the Springfield area and, thus, did not change the determination of need. Further, ISO-NE clarifies that on July 19, 2005, the 115 kV ties from Massachusetts to Connecticut were not opened, but rather the North Bloomfield substation was reconfigured to separate the Massachusetts 115 kV lines from the Connecticut 115 kV lines and the North Bloomfield autotransformer was used to feed the Massachusetts system. ISO-NE argues that, although system reconfiguration may be used during times of high system stress, it is not a preferred operating mode.

d. Commission Determination

21. Under Market Rule 1, ISO-NE has the authority to determine whether a generator is needed for reliability purposes, which is a prerequisite for negotiating an RMR Agreement. The Commission must review CEEMI's proposed RMR Agreement and its supporting documents, filed pursuant to section 205, as it reviews any other proposed rate schedule and its accompanying cost support. Just as the Commission has the obligation to review the cost support accompanying a proposed rate schedule, it has the same obligation to review the evidence, including ISO-NE's reliability determination, accompanying a proposed RMR agreement.¹⁶

¹⁵ MMWEC Supplemental Comments at 7, n.9.

¹⁶ *Bridgeport Energy, LLC*, 114 FERC ¶ 61,265 at P 12 (2006).

22. The ISO-NE Reports¹⁷ indicate that ISO-NE determined that both GT-1 and GT-2 are needed individually to maintain system flows within the applicable reliability criteria of both ISO-NE and Northeast Utilities for system thermal performance for key contingencies at load levels below the projected summer peak for 2006. ISO-NE states that a loadflow analysis was performed to evaluate thermal and voltage performance in the Springfield area. CEEMI states that, with either GT-1 or GT-2 non-operational and the contingent loss of either a single line or a double tower contingency, reliability criteria regarding thermal overloads and system voltage would be violated. Specifically, there would be an unacceptable thermal overloading on the 1322 Line between East Springfield and Breckwood. ISO-NE states that, under the same loadflow analysis but with the GTs in operation, for a single line contingency, the GTs would be able to mitigate thermal overload on the 1322 Line for New England load levels up to approximately 27,400 MW.

23. The Commission finds that, in contrast, MMWEC has not presented evidence to prove that ISO-NE's reliability determination is incorrect. Further, as ISO-NE notes in its answer, following the revised Fore River determination, a review was performed of previous reliability determinations to evaluate, among other things (*e.g.*, multiple element contingencies), whether any findings of need had been based on a generation pattern which could have been altered. This evaluation modeled plausible alterations of generation patterns and showed that the overloads could not be eliminated because the overloads are due to a generation deficiency in the Springfield area, as opposed to a situation where there is too much generation (as in Fore River).

24. Additionally, ISO-NE's Operating Procedure No. 19 (OP 19) distinguishes between two levels of transmission reliability: normal (non-stressed) conditions and emergency (stressed) conditions. During normal conditions a higher level of prescribed reliability is maintained; however, during emergency conditions a lower level of reliability is permitted to allow for increased operating flexibility and to minimize the impact on customers. ISO-NE states that the overloads identified in the reliability determination are caused by the loss of the 1254 line, which means that the overloads are due to a single element contingency. ISO-NE states that, because the loss of the 1254 line causes thermal overloads which would have to be eliminated following the occurrence of a single element contingency, ISO-NE found that the GTs were needed for reliability. OP 19 states the New England transmission system is operated so that the most severe single contingency can be sustained and that actions are taken to maintain normal conditions.

¹⁷ "ISO New England – System Planning Department, Evaluation of Need for West Springfield GT 1, Date: February 7, 2006" and "ISO New England – System Planning Department, Evaluation of Need for West Springfield GT 2, Date: February 7, 2006."

25. Based on the information provided by CEEMI and ISO-NE, we find that ISO-NE properly determined that the GTs are needed for reliability purposes.

3. Facility Costs

a. Comments

26. MMWEC urges the Commission to reject CEEMI's proposed RMR Agreement. MMWEC argues that acceptance of the proposed RMR Agreement would violate Commission precedent holding that RMR agreements are to be invoked only as a remedy of last resort. According to MMWEC, the purpose of an RMR agreement is not to ensure that a generator recovers a return on its investment, but to ensure that the generator earns enough revenue to justify the continued operation of the unit. MMWEC argues that the data CEEMI included in its filing to show an under-recovery of costs is largely unsupported and erroneously includes certain items that should not be treated as facility costs.

27. Specifically, MMWEC questions CEEMI's inclusion of interest expense as a facility cost. MMWEC argues that CEEMI's interest expense appears to be owner's equity that was relabeled as debt, because it was not derived from borrowings in arm's length transactions with non-affiliated lenders and because CEEMI has not shown that this expense must be paid to keep the GTs operational. Also, MMWEC questions CEEMI's allocation of O&M expenses to the GTs, contending that certain O&M expenses may have been allocated entirely to facilities other than the GTs in CEEMI's prior RMR filing in Docket No. ER05-903, *et al.*, but that for the purpose of this filing, 35 percent of those O&M expenses are being allocated to the GTs.

28. MMWEC also asserts that various revenues appear to be missing from CEEMI's facility costs analysis. For example, CEEMI lists New York ICAP revenues as "Other Non-Market Revenues"; however, this item was not included in calculating "Net Revenue above Facility Costs" for the year 2005. Also, CEEMI did not provide data concerning fuel trading, wholesale standard offer supply agreements, and forward bilateral transactions.

29. MMWEC notes CEEMI's change in energy margin from a loss of \$224,000 in 2003 to earnings of \$1,326,000 in 2005.¹⁸ MMWEC suggests that this difference may

¹⁸ CEEMI explains in its deficiency response that the energy margin was calculated as the sum of gross energy revenues (generation times Energy Clearing Price) plus make whole energy payments (*i.e.*, uplift), less fuel costs (supply and transportation), unit outage insurance and station load net energy costs (ISO-NE wholesale costs).

not be explained by CEEMI's shift in participation in the Forward Reserve Market (FRM) to the energy market, but rather by a more favorable going-forward revenue forecast. MMWEC also questions CEEMI's brief note in its transmittal letter, describing negotiations concerning the relevant tax entries. MMWEC requests that CEEMI be required to produce the underlying tax bills.

30. Finally, MMWEC argues that CEEMI has failed to demonstrate that the GTs have not had a fair opportunity to recover their facility costs through the market. MMWEC contends that when CEEMI decided to stop participating in the FRM, it might not have been pursuing a bid strategy designed to maximize revenues, and that CEEMI might be able to recover sufficient revenues by bidding the GTs in both the FRM and the energy market. MMWEC also disagrees with CEEMI's remarks that it will not be helped by the introduction of a Locational Forward Reserve Market, which is expected to be in-place in late 2006.¹⁹

31. MassAG and NUSCO argue that the RMR Agreement must be rejected because CEEMI failed to demonstrate that the GTs are unable to recover their facility costs and are thus ineligible for RMR treatment. MassAG makes similar arguments to MMWEC's regarding CEEMI's interest expense, allocation of O&M expenses, other potential sources of revenue, and energy margin. MassAG also questions CEEMI's basis for allocating 5.16 percent of the administrative and general (A&G) expenses from an affiliated company to the GTs. Additionally, MassAG requests that CEEMI be required to provide audited financial statements verifying the accuracy and validity of its claimed revenues and expenses.

b. CEEMI's Answer and Deficiency Response

32. CEEMI states in its May 9 Answer that the costs it included in its analysis are properly attributable to the operation of GT-1 and GT-2 and not to CEEMI's other units. CEEMI explains that GT-1 and GT-2 have always been accounted for and operated by CEEMI as a separate business unit, Consolidated Edison Energy Massachusetts Expansion (CEEMEX).

33. In the CEEMI deficiency response, CEEMI explains how it determined the energy margin in calculating the facility costs, provided the trading revenues booked to CEEMEX, provided information on projected revenues if GT-1 and GT-2 were to operate

¹⁹ On May 12, 2006, the Commission accepted revisions to ISO-NE's tariff, including a proposed Locational Forward Reserve Market. *See New England Power Pool and ISO New England Inc.*, 115 FERC ¶ 61,175 (2006).

in the FRM, and provided information on the allocation of O&M expenses.²⁰ Additionally, CEEMI states that it provided information regarding the interest expense, including the relevant terms of its promissory note with Consolidated Edison Development, Inc. (CED). CEEMI explains that the consequences of nonpayment of the interest expense are discretionary unilaterally to CED. CEEMI also explains that the GTs have benefited historically from each year's tax losses at a consolidated level due to a tax sharing agreement between ConEdison Development²¹ and Consolidated Edison, Inc. that pays dollar for dollar, all tax benefits due to tax losses which reduce Consolidated Edison, Inc.'s Federal and New York State tax liability.

c. MMWEC Supplemental Protest

34. MMWEC argues that CEEMI failed to show that the RMR Agreement is necessary financially to keep the GTs available. MMWEC asserts that CEEMI's May 9 Answer and deficiency response reinforce its conclusion that interest expense must be excluded from facility costs. MMWEC reasons that CEEMI's deficiency response shows that the loan from CED to CEEMI is unsecured and that the only consequence of non-payment is immediate acceleration of the outstanding principal and interest; thus, it appears that the interest expense is essentially a return on "equity." Additionally, MMWEC argues that any "dollar for dollar" payments that CEEMI receives under the tax sharing agreement or any payments received from unit outage insurance policies should be included as revenue in CEEMI's calculation of facility costs.

35. MMWEC also emphasizes that CEEMI does not acknowledge the substantial transition payments it will begin to receive on December 1, 2006 through the Order Accepting Settlement. MMWEC notes that these payments will begin at \$3.05/kW-month and increase to \$4.10/kW-month by 2009; MMWEC calculates that this would result in annual transition payments for the GTs starting in excess of \$3.5 million and increasing to more than \$4.7 million. MMWEC argues that these transition payments will eliminate any facility costs shortfall and urges that the transition payments be taken into account.

36. In response to CEEMI's request for confidential treatment of information included in CEEMI's deficiency response, MMWEC argues that, to the extent that the Commission intends to review the materials that were filed on a confidential basis, the Commission should (1) enter a protective order; (2) direct CEEMI to produce the information withheld from the public version of its filing pursuant to that protective

²⁰ CEEMI requested privileged treatment for the portion of the CEEMI Deficiency Response setting forth detailed information and support for CEEMI and CEEMEX O&M expenses, portions of which have been allocated to GT-1 and GT-2.

²¹ CEEMI's parent company.

order; and (3) issue an additional notice setting an appropriate period of time for review and comment upon the confidential information.

d. CEEMI's Answer

37. In its August 1 answer, CEEMI argues that its interest expense is correctly included in its facility costs, and that it accurately set forth the revenues that would be available to GT-1 and GT-2 in the absence of an RMR Agreement. CEEMI also notes that GT-1 and GT-2 have not received any payments under unit outage insurance policies. To further support its facility costs analysis, CEEMI provides another analysis that excludes interest expense and takes New York ICAP revenues and trading revenues into account to demonstrate that, even considering MMWEC's arguments, GT-1 and GT-2 still fail to recover their costs.

38. Regarding the transition payments, CEEMI argues that a facility costs analysis is based on actual, not hypothetical data for one or more test years prior to the filing. CEEMI further states that the Order Accepting Settlement provides for credits of other sources of revenues against transition payments, so if transition payments prove to be as robust as MMWEC suggests, the provisions of the proposed RMR Agreement will assure that aggregate revenues do not exceed the units' appropriately-determined cost-of-service.

e. Commission Determination

39. The Commission has responsibility under section 205 of the FPA to ensure that all rates and charges by any public utility for the sale of electric energy subject to the Commission's jurisdiction shall be just and reasonable.²² In its review of proposed RMR Agreements, the Commission "consider[s] the *need* for these contracts, and the justness and reasonableness of the rates proposed therein, as they are filed."²³ As indicated below, we are setting for hearing the determination of whether the proposed RMR Agreement is necessary for CEEMI to remain operational. In order to make this finding, the Commission compares on both an historic and prospective basis the facility costs, such as O&M, A&G, and taxes to revenues earned in the energy and capacity markets.²⁴

²² 16 U.S.C. § 824d (2000).

²³ *Devon Power LLC*, 107 FERC ¶ 61,240 at P 72 (2004), *order on reh'g*, 109 FERC ¶ 61,154 (2004), *order on reh'g*, 110 FERC ¶ 61,315 (2005) (emphasis added).

²⁴ Facility costs are costs ordinarily necessary to keep a facility available. See *Bridgeport Energy, LLC*, 112 FERC ¶ 61,253 at P 35 (2004) (*Bridgeport I*).

Now that the Commission has approved the Order Accepting Settlement, we will include prospective transition payments in the facility costs test.²⁵

40. We find that whether the proposed RMR Agreement is necessary for GT-1 and GT-2 to recover their costs raises issues of material fact that cannot be resolved on the record before us, and are more appropriately addressed in the hearing and settlement judge procedures ordered below.

41. CEEMI has requested privileged treatment for its requested detailed information and support for CEEMI and CEEMI Expansion O&M expenses. This is an issue best left to the judge to resolve in the course of the hearing. Also, whether CEEMI should produce its underlying tax bills is equally an issue best left resolved in the course of the hearing.

42. Protestors contend that CEEMI's interest expense should not be included as a facility cost. In previous orders, the Commission has permitted debt service payments to be included in facility costs, reasoning that debt service payments are fixed payments that a facility is obligated to pay its creditors to maintain operation of the facility and avoid foreclosure.²⁶ Although, in general, debt service payments may be included as facility costs, the Commission will review each RMR Agreement on a case-by-case basis to determine whether particular debt service payments should be considered as facility costs.²⁷ In this case, it is uncertain if CEEMI's interest expense is properly classified as a debt service payment. Therefore, the parties should address at hearing whether the payments to CED are appropriately classified as debt service payments.

43. CEEMI fails to include New York ICAP revenues and revenues from fuel trading, wholesale standard offer supply agreements, and forward bilateral transactions in its calculations of "Net Revenue above Facility Costs". As established in *Bridgeport I*, the Commission will compare facility costs to revenues earned in the energy and capacity markets in determining whether a proposed RMR Agreement is necessary for a generating facility to remain operational.²⁸ We find that these revenues should be

²⁵ The Commission also stated that the transition payments will be netted against RMR revenues, which will protect against over-recovery. *See* Order Accepting Settlement, 115 FERC ¶ 61,340 at P 166.

²⁶ *Berkshire Power Company, LLC*, 112 FERC ¶ 61,253 at P 25 (2005) (*Berkshire I*), *reh'g denied*, 114 FERC ¶ 61,099 at P 7 (2006) (*Berkshire II*).

²⁷ *Berkshire II*, 114 FERC ¶ 61,099 at P 9.

²⁸ *Bridgeport I*, 112 FERC ¶ 61,077 at P 36.

reflected in the facility costs test; however, the exact dollar amount that should be included should be addressed at hearing. Additionally, the hearing should determine whether any revenues CEEMI receives under the tax sharing agreement should be considered as revenues in the facility costs test.

44. It is also important to determine the costs and revenues that are unique to GT-1 and GT-2. It is unclear if CEEMI has correctly allocated O&M and A&G expenses between the GTs and other units in CEEMI's portfolio. Therefore, the appropriate allocations of O&M, A&G and taxes also should be addressed at hearing.

45. We reject MMWEC's arguments that CEEMI might not be pursuing a bid strategy designed to maximize revenues, and that CEEMI might be able to bid the GTs in both the FRM and energy market. Although MMWEC speculates that prices to be paid under the Locational Forward Reserve Market will approach the cap of \$14 per kW-month in constrained zones, GT-1 and GT-2 are not currently located in a zone that will be considered to be constrained for Locational Forward Reserve Market pricing purposes. Also, because prices will be determined by auction, the ultimate prices will be unknown.

46. As stated previously, the issue of whether the proposed RMR Agreement is necessary for CEEMI to recover its facility costs is set for hearing and settlement judge procedures. If the Commission ultimately determines that the RMR Agreement is necessary, then a just and reasonable cost-of-service rate will need to be established in this proceeding. While the hearing and settlement judge procedures established in this order should consider the entire cost-of-service, the Commission will rule summarily on certain other aspects of the RMR Agreement, and provide additional guidance for the ordered hearing, as discussed below.

C. Cost of Service

47. CEEMI proposes cost recovery for the term of the proposed RMR Agreement pursuant to the *Pro Forma* COS Agreement. CEEMI proposes a proxy capital structure of 50 percent debt and 50 percent equity and a rate of return on common equity (ROE) of 10.88 percent, leading to an overall return on rate base. CEEMI proposes a total annual fixed cost of \$11,957,606.²⁹

1. Going Forward Costs

48. MMWEC contends that the rates proposed by CEEMI for its RMR Agreement have not been shown to be just and reasonable. MMWEC contends that any RMR

²⁹ Exhibit No. ACH-3, Schedule 1 at 1.

Agreement should be limited to the recovery of “going forward” costs³⁰ under which CEEMI would be able to recover through the proposed RMR Agreement its actual and reasonable out-of-pocket costs incurred during the term of the proposed RMR Agreement. MMWEC recognizes that the Commission has rejected requests that proposed RMR Agreements be limited to going forward costs.³¹ However, MMWEC asserts that section 3.3.1(c)(iii) of Market Rule 1 makes clear that a full cost-of-service is not a mandate in all instances, stating that the would-be RMR generator “shall file for cost-based rates under Section 205 with each party free to take any position it determines appropriate regarding recovery of return of and on investment.”³² MMWEC argues that it would make little sense to allow parties to take any position regarding recovery of return of and on investment if Market Rule 1 required full cost-of-service rates in all circumstances.³³

49. The Commission will reject MMWEC’s proposal that the proposed RMR Agreement be limited to going forward costs. In prior RMR proceedings, the Commission has permitted recovery of both fixed costs and variable costs as essential costs for the services that the units continue to provide.³⁴ As the Commission has noted, the cost-of-service approach is appropriate for RMR agreements because any other revenues that these units earn are credited against the monthly fixed charges.³⁵ Accordingly, to the extent that ISO-NE needs GT-1 and GT-2 for reliability, we will, consistent with precedent, accord them an appropriate cost-of-service rate.

³⁰ MMWEC defines “going forward” costs for these purposes as fixed O&M, A&G and taxes.

³¹ MMWEC protest at 25.

³² *Id.* at 26.

³³ *Id.*

³⁴ *Mirant Kendall, LLC, and Mirant Americas Energy Marketing, LP*, 109 FERC ¶ 61,227 at P 36 (2004); *Milford Power Co., LLC*, 110 FERC ¶ 61,299 at P 70 (2005) (*Milford I*), *order on reh’g*, 112 FERC ¶ 61,154 at P 28-29 (2005) (*Milford II*); *Bridgeport I*, 112 FERC ¶ 61,077 at P 44, 46; *Bridgeport II*, 113 FERC ¶ 61,311 at P 36; *Berkshire I*, 112 FERC ¶ 61,253 at P 29; *Berkshire II*, 114 FERC ¶ 61,099 at P 10-11.

³⁵ *Bridgeport I*, 112 FERC ¶ 61,077 at P 46.

2. Rate of Return

50. MMWEC argues that CEEMI's proposed ROE of 10.88 percent should be reduced or investigated because CEEMI's proposal is based on stale proxy group data. MMWEC asserts that updating the proxy group data could lower the return to 9.5 percent. Additionally, MassAG asserts that CEEMI's proposal is flawed because it is based on a proxy capital structure rather than CEEMI's actual capital structure and because CEEMI failed to support the ROE and the cost of long-term debt.

51. The Commission has previously found that a 10.88 percent ROE is a conservative proxy for merchant generating facilities.³⁶ However, we have also stated that we would prefer to use an actual debt/equity ratio rather than a hypothetical rate.³⁷ Therefore, a determination of the appropriate debt/equity ratio to be used in calculating CEEMI's Annual Revenue Requirement should be addressed at hearing.

3. Levelized Rate

52. MMWEC urges the Commission to reject CEEMI's proposal to use non-levelized rates. MMWEC argues that the circumstances in the case, such as newness of the units and relatively short time the RMR Agreement will be in place, warrant the use of levelized rates. MMWEC states that a non-levelized rate would lead to potential significant over-recoveries; in the "out years," when cost-based rates under the non-levelized, declining rate base method would be lower than levelized rates, it is likely that CEEMI will return to selling at market rates, leading to additional over-recovery.

53. We find that the issue of whether rates should be set on a levelized basis raises issues of material fact that cannot be resolved on the record before us, and are more appropriately addressed in the hearing and settlement judge procedures ordered below.

D. Termination Date

54. CEEMI requests that the RMR Agreement remain in effect until "full implementation of the capacity payment mechanism approved by the Commission in the LICAP proceeding, Docket Nos. ER03-563, *et al.*, or any related proceedings. If there is

³⁶ *Devon Power, LLC*, 104 FERC ¶ 61,123 at P 48-49 (2003); *PSEG Power Connecticut, LLC*, 110 FERC ¶ 61,020 at P 45 (2005) (*PSEG I*), *order on reh'g*, 110 FERC ¶ 61,441 (2005), *order on reh'g*, 113 FERC ¶ 61,210 (2005); *Milford I*, 110 FERC ¶ 61,299 at 72; *Bridgeport I*, 112 FERC ¶ 61,077 at P 48; *Pittsfield Generating Co., LP*, 115 FERC ¶ 61,059 at P 65 (2006) (*Pittsfield I*).

³⁷ *Milford I*, 110 FERC ¶ 61,299 at P 73; *Mystic Development, LLC*, 114 FERC ¶ 61,200 at P 50 (2006); *Pittsfield I*, 115 FERC ¶ 61,059 at P 65.

a transition period prior to the full implantation of any capacity payment mechanism approved by the Commission in the LICAP proceeding, Docket Nos. ER03-563, *et al.*, or any related proceedings, this Agreement, during the transition period will be treated in accordance with the Commission's determination in the LICAP or any related proceedings."³⁸

55. MMWEC argues that CEEMI should be required to show cause why the proposed RMR Agreement should not be terminated as of December 1, 2006, the date on which CEEMI will begin to receive transition payments for the GTs under the Order Accepting Settlement.

56. The Commission addressed this issue in the Order Accepting Settlement. The Commission will not require the termination of existing RMR Agreements before the full implementation of the FCM and will not require RMR units to reapply for new RMR Agreements. In the Order Accepting Settlement, the Commission stated that it:

has consistently accepted RMR agreements for a term that expires upon implementation of a locational capacity mechanism. FCM will not result in the purchase of capacity until the beginning of the first commitment period in June 2010. Therefore, the June 2010 termination date of RMR agreements is consistent with the express terms of the RMR agreements and the Commission's intent that those contracts terminate when a capacity market mechanism is fully implemented.³⁹

57. We reject MMWEC's request to terminate the proposed RMR Agreement as of December 1, 2006. In setting the need for these agreements for hearing, we have already stated that we will consider transition payments when applying the so-called facility costs test. This should address MMWEC's concern regarding these payments. Further, as stated in the Order Accepting Settlement, we note that parties have the right to challenge an RMR Agreement, if there are changes in a generator's compensation or changes to system infrastructure.⁴⁰

E. Proposed Deviations from the Pro Forma COS Agreement

58. As stated elsewhere in this order, the issue of whether the proposed RMR Agreement is necessary for GT-1 and GT-2 is set for hearing and settlement judge

³⁸ See CEEMI's proposed change to section 2.2.4 of the RMR Agreement.

³⁹ Order Accepting Settlement, 115 FERC ¶ 61,340 at P 166 (citations omitted).

⁴⁰ *Id.*

procedures. If the hearing determines that the RMR Agreement is necessary, then the ensuing discussion of the proposed deviations from the *Pro Forma* COS Agreement will be pertinent.

59. MMWEC requests that CEEMI be directed to identify and justify all of the redlined changes in the proposed RMR Agreement. Specifically, MMWEC objects to proposed section 2.2.4, a new termination provision, which MMWEC states is overly restrictive because it seems to limit the ability to seek to terminate the RMR Agreement once the transition payment regimen is implemented. Also, MMWEC notes that section 3.1.2 of the *Pro Forma* COS Agreement states that “[a]ny revenues (including from bilateral agreements, emissions credits, release of firm transportation arrangements, etc.) will be offset against payments made to the Resource under this Agreement,” and that CEEMI has changed Section 3.1.2 to read “[a]ny revenues *related to the Resource* (including from bilateral agreements, emissions credits, release of firm transportation agreements, etc.)”⁴¹ MMWEC questions what revenues are, or are not, in CEEMI’s opinion “related” to its Resources.

60. The Commission rejects MMWEC’s arguments that proposed section 2.2.4 is overly restrictive. As stated above, the Commission will not require the termination of existing RMR Agreements before the full implementation of the FCM, although parties have the right to challenge an RMR Agreement, if there are changes in a generator’s compensation or changes to system infrastructure. We also note that ISO-NE may terminate the proposed RMR Agreement upon 120-days’ notice under section 2.2.1 of the proposed RMR Agreement if it is determined that the GTs are no longer needed for reliability.

61. The Commission rejects MMWEC’s request to have CEEMI remove the “related to the Resource” language from section 3.1.2. The Commission clarifies that any revenues earned or related to GT-1 and GT-2 must be credited against the fixed monthly charge. As discussed above, this also includes, but is not limited to, New York ICAP revenues and revenues from fuel trading, wholesale standard offer supply agreements, and forward bilateral transactions. This language also clarifies that revenues earned by other units under the same ownership that are not under this RMR Agreement do not have to credit their revenues against the monthly fixed cost charge of the GTs.

F. Waiver Request

62. CEEMI requests that the Commission accept its proposed RMR Agreement and grant waiver of the Commission’s 60-day prior notice requirement⁴² to permit an

⁴¹ MMWEC Protest at 15-16.

⁴² See 16 U.S.C. § 824d (2000); 18 C.F.R. § 35.3 (2006).

effective date of March 31, 2006. CEEMI states that ISO-NE has determined that GT-1 and GT-2 must be available to assure system reliability and agrees that it will execute the RMR Agreement effective March 31, 2006 upon the Commission's approval of the rates charged in the RMR Agreement. CEEMI contends that waiver is appropriate so it can collect the appropriate revenue requirement to sustain uninterrupted availability of GT-1 and GT-2 throughout 2006. CEEMI also indicates that ISO-NE did not issue its letter enclosing the system reliability final report until February 23, 2006.

63. MMWEC argues that CEEMI has not shown good cause why the RMR Agreement should go into effect as of March 31, 2006 rather than 60 days after the date the RMR Agreement was filed.

64. The Commission has granted waiver where: (1) agreements are intended to permit a generator needed to assure system reliability to operate; (2) the applicant may only learn upon very short notice which units will be RMR units; and (3) the applicant may not be able to file 60 days prior to the commencement of service due to short notice.⁴³ ISO-NE notified CEEMI of its reliability determination on February 23, 2006, and stated that it would begin negotiations with CEEMI for an RMR Agreement. CEEMI then negotiated the RMR Agreement with ISO-NE and filed it March 30, 2006. In this circumstance, we find good cause to grant waiver of the 60-day prior notice requirement.

G. Hearing and Settlement Judge Procedures

65. The Commission's preliminary analysis of CEEMI's filing indicates that it has not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory or preferential or otherwise unlawful. Accordingly, we will conditionally accept CEEMI's proposed RMR Agreement for filing, suspend it for a nominal period, make it effective on March 31, 2006, subject to refund, and set it for hearing and settlement judge procedures as ordered below.

66. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.⁴⁴ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding;

⁴³ See *Mirant Americas Energy Marketing, LP*, 105 FERC ¶ 61,227 at P 14-16 (2003). See also *Milford I*, 110 FERC ¶ 61,299 at P 25.

⁴⁴ 18 C.F.R. § 385.603 (2006).

otherwise, the Chief Judge will select a judge for this purpose.⁴⁵ The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of this order concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) The proposed RMR Agreement filed by CEEMI is hereby conditionally accepted for filing, as modified, and suspended for a nominal period, to become effective March 31, 2006, subject to refund, as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning the proposed RMR Agreement. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Paragraphs (C) and (D).

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2006), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(D) Within thirty (30) days of the date of this order, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days

⁴⁵ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(E) If the settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in this proceeding in a hearing room of the Commission, 888 First Street, N.E., Washington, D.C. 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss), as provided in the Commission's Rules of Practice and Procedure.

(F) CEEMI is hereby directed to submit a compliance filing within 30 days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.